

Following a jury trial, Phillip Gregory Yeary was found guilty of two counts of Criminal Confinement¹ as class B felonies, two counts of Intimidation² as class C felonies, two counts of Criminal Recklessness³ as class D felonies, two counts of Illegal Possession of a Handgun⁴ as class A misdemeanors, and one count of Pointing a Firearm⁵ as a class A misdemeanor. Yeary raises the following consolidated and restated issues:

1. Did the trial court properly admit rebuttal evidence introduced by the State?
2. Did the trial court properly deny Yeary's motion for a mistrial?
3. Did the State present sufficient evidence to support Yeary's convictions for criminal confinement, intimidation, and illegal possession of a handgun?
4. Was Yeary's sentence appropriate?

We affirm.

The facts most favorable to the jury's verdict reveal that Yeary was married to Jennifer Yeary. During the events in question, the couple lived in Cincinnati, Ohio and had two children, T.Y., age seven, and K.Y., age four. Yeary was employed as a security guard at the Belterra Casino in Switzerland County, Indiana.

In January 2006, Yeary and Jennifer attended an employee party at Belterra Casino with their friends Lewis and Alicia Fritter. At the party, Jennifer began talking to

¹ Ind. Code Ann. § 35-42-3-3 (West, PREMISE through 2007 1st Regular Sess.).

² Ind. Code Ann. § 35-45-2-1 (West, PREMISE through 2007 1st Regular Sess.).

³ I.C. § 35-42-2-2 (West, PREMISE through 2007 1st Regular Sess.).

⁴ Ind. Code Ann. § 35-47-2-1 (West, PREMISE through 2007 1st Regular Sess.).

⁵ I.C. § 35-47-4-3 (West, PREMISE through 2007 1st Regular Sess.).

Patrick Monjar, whom she knew from high school. This angered Yeary, and he gave Jennifer dirty looks. When Jennifer attempted to introduce Yeary to Monjar, Yeary left the ballroom where the party was being held, slamming the door behind him. Jennifer and the Fritters decided that it was probably best to leave the party at that point and followed Yeary outside. In the parking lot, Jennifer saw Yeary walking back towards the building. He approached Jennifer, showed her a gun, and said, “[I]t’s a good thing that you came out when you did because I was going to come in and shoot him [Monjar].” *Transcript at 81.*

The Yearys and the Fritters then got in Yeary’s truck and drove to a bar in Vevay, Indiana. At the bar, Yeary came up to Jennifer and told her that he was very angry with her because she had made him look bad in front of his co-workers. He then told Jennifer that he wanted to kill her. When Yeary re-iterated to Jennifer a short time later that he wanted to kill her, she became upset. Yeary took Jennifer outside to his truck where he continued to tell her that he was disappointed with her for making him look bad in front of his co-workers and that he wanted to kill her. A short time later, the Fritters followed the Yearys outside, got in Yeary’s truck, and Yeary drove everyone to the Fritters’ home. Jennifer and Yeary stayed at the Fritters for a short time and then left to go home. Because Yeary had been drinking, Jennifer drove.

As Jennifer neared the Patriot boat ramp on River Road, Yeary ordered her to pull over, which Jennifer did. Yeary walked Jennifer to the river and began berating her. Yeary was angry and repeatedly told Jennifer that he was ashamed of her and wanted to kill her. As he said these things, Yeary started to spit on Jennifer. Jennifer testified that

she was scared, did not feel free to leave, and felt that her life was in danger. Yeary kept Jennifer down by the river for nearly half an hour. He then made Jennifer walk back to the truck. Yeary got in on the driver's side and started the truck. He continued to spit on Jennifer. As he was driving away from the boat ramp, Yeary pulled out his gun and fired several shots into the air. The discharged shell casings hit Jennifer who was sitting in the passenger seat.

In March 2006, Jennifer purchased a home in Switzerland County, Indiana located on Markland Pike. Jennifer and Yeary intended to purchase the house together, but Yeary was not financially able to obtain a mortgage. Bank representatives informed Jennifer that she could purchase the home on her own but not with Yeary. The mortgage and the deed to the Markland Pike property were listed solely in Jennifer's name.

On April 6, 2006, Jennifer and Yeary left their home in Cincinnati and went to the Markland Pike property to do some renovation work. After working for several hours, Jennifer decided she should take the children home because T.Y. had school the next day. She asked Yeary if he wanted to go, and Yeary, in an effort to spite Jennifer, said no. As Jennifer was driving away from the house with both children in the vehicle, she saw Yeary come out on the front porch and point a gun at the car. This scared Jennifer, but she decided to back the car up into the driveway and see if Yeary had changed his mind about going home. As Yeary approached the vehicle, he placed the gun he had been holding in his pocket. Yeary opened the passenger side door, reached inside the center console, and took out a gun that was stored there. Yeary then knelt down, rested his elbows on the passenger seat, and pointed the gun at Jennifer's head. Yeary held the gun

pointed at Jennifer's head for what felt like a long time to Jennifer while she pleaded for him not to shoot. Jennifer testified that while the gun was pointed at her she did not feel free to leave and was fearful for her life. Eventually, Yeary lowered the weapon, closed the passenger door, and walked away. At that point, Jennifer drove away from the Markland Pike property.

Roughly a week after the April 6th incident, Jennifer contacted Switzerland County Sheriff Nathan Hughes. She informed Sheriff Hughes about the January 2006 and April 6, 2006 incidents with Yeary. Jennifer told Sheriff Hughes that she did not want an investigation started or charges filed against Yeary at that time as she felt that would only make matters worse.

In June 2006, Jennifer sought a protective order against Yeary. In her petition, Jennifer specifically referenced the April 6, 2006, incident. The protective order was granted in July 2006.

On September 8, 2006, Jennifer spoke with Deputy Richard Lock of the Switzerland County Sheriff's Department. At that time, she noted that Yeary had begun following her, and was sending possessive text messages. Fearful of this conduct, Jennifer asked Deputy Lock to begin an investigation of Yeary. Following Deputy Lock's investigation, the State filed the following charges against Yeary: Count 1- Criminal Confinement as a class B felony, for the January 2006 incident; Count 2- Criminal Confinement as a class B felony, for the April 2006 incident; Count 3- Intimidation as a class C felony, for the January 2006 incident; Count 4- Intimidation as a class C felony, for the April 2006 incident; Count 5- Criminal Recklessness as a class D

felony, for the January 2006 incident; Count 6- Criminal Recklessness as a Class D felony, for the April 2006 incident; Count 7- Illegal Possession of a Handgun as a class A misdemeanor, for the January 2006 incident; Count 8- Illegal Possession of a Handgun as a class A misdemeanor, for the April 2006 incident; Count 9- Domestic Battery as a class A misdemeanor, for the January 2006 incident; and Count 10- Pointing a Firearm as a class A misdemeanor, for the April 2006 incident.

Yeary's jury trial began on December 12, 2006. During the trial, both Jennifer and Yeary testified. The jury ultimately found Yeary guilty of all counts except Count 9. The trial court held a sentencing hearing on February 16, 2007. Thereafter, it issued a sentencing order in which it found that Yeary's lack of a criminal history and the hardship imprisonment would cause his children were mitigating circumstances. The trial court noted that the offenses Yeary committed on April 6, 2006, were done in front of children under the age of eighteen, and it found this to be an aggravating factor. The trial court determined that the mitigating factors did not warrant a reduced sentence. Finding that Counts 1, 3, 5, and 7 were the same episode of criminal conduct, the trial court merged Counts 3, 5, and 7 into Count 1 and entered a ten-year sentence. Similarly, the trial court found Counts 2, 4, 6, 8, and 10 were the same episode of criminal conduct. It merged Counts 4, 6, 8, and 10 into Count 2 and entered a ten-year sentence on that count. The trial court specified that Yeary's sentences should be served consecutively. This appeal ensued. Additional facts will be provided as needed.

Yeary argues that the trial court erred in allowing the State to introduce certain rebuttal testimony and evidence. The admission or exclusion of evidence lies within the discretion of the trial court and is afforded great deference on appeal. *Whiteside v. State*, 853 N.E.2d 1021 (Ind. Ct. App. 2006). We will only reverse the trial court's ruling on the admissibility of evidence for an abuse of discretion. *Id.* "An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id.* at 1025.

At trial, Yeary's principal defense centered on an alleged romantic affair Jennifer had with her divorce attorney, Anthony Sabo. Yeary's counsel theorized that Jennifer fabricated the allegations she made about Yeary hoping that this would lead to his arrest. With Yeary out of the picture, Jennifer would be free to carry on her alleged relationship with Sabo and would easily retain custody of T.Y. and K.Y.

When Yeary took the stand, his counsel asked him if he had been following and intimidating Sabo, and Yeary responded that he had not. Yeary's counsel then brought up a person by the name of Jerri Worthington, who was Sabo's ex-girlfriend. Yeary testified that in September 2006, Worthington contacted him and told him that Jennifer and Sabo were having an affair. Worthington told Yeary that she had keys to Sabo's house and asked Yeary if he would enter Sabo's house and damage his property. Yeary testified that he did not want anything to do with Worthington's plan and denied taking the keys to Sabo's house.

With the jury out of the courtroom, the State requested permission to present rebuttal evidence. The State indicated that as part of its rebuttal evidence it intended to call Sabo to the stand along with Deputy Lock and Officer Norman Rimstidt of the Rising Sun Police Department. Yeary's counsel objected arguing that the rebuttal evidence was inadmissible under Indiana Evidence Rules 404 and 403. The judge found that Yeary had opened the door to the State's proposed rebuttal evidence and allowed the State to call its rebuttal witnesses.

In rebuttal, Sabo testified that on two different occasions Yeary had followed him and intimidated him with threatening text messages. Sabo also stated that Worthington had a key to his home and that on one occasion he had returned home and found feces on the floor in several different places. Officer Rimstidt testified that the Rising Sun Police Department had received a complaint from Sabo about Yeary following him. Deputy Lock testified about a jail surveillance video that was shown to the jury. The video showed Yeary talking about being in Sabo's residence.⁶

A.

Yeary first argues that the State's rebuttal evidence was inadmissible under Evidence Rules 403, 404(b), and 608(b). Yeary did not raise a specific objection to the State's rebuttal evidence pursuant to Evidence Rule 608(b). "Grounds for objection must be specific and any grounds not raised in the trial court are not available on appeal."

⁶ The State also called Jennifer as a rebuttal witness. Yeary does not argue that this constituted error. Therefore, we do not address this.

Grace v. State, 731 N.E.2d 442, 444 (Ind. 2000). Therefore, Yeary's arguments regarding Evidence Rule 608(b) are not available here.

Yeary contends that the State's rebuttal evidence was inadmissible under Evidence Rule 404(b) as evidence of prior bad acts. Evidence Rule 404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

The rationale underlying this rule is that the jury is precluded from making the forbidden inference that the defendant has a criminal propensity and therefore engaged in the charged conduct. *Gillespie v. State*, 832 N.E.2d 1112 (Ind. Ct. App. 2005). In assessing the admissibility of evidence under Evidence Rule 404(b), we must (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Evidence Rule 403. *Id.* "Although evidence of a prior bad act is generally not admissible under Ind. Evid. R. 404(b), 'otherwise inadmissible evidence may become admissible where the defendant 'opens the door' to questioning on that evidence.'" *Crafton v. State*, 821 N.E.2d 907, 911 (Ind. Ct. App. 2005) (quoting *Jackson v. State*, 728 N.E.2d 147, 152 (Ind. 2000)). Evidence that is relied upon to open the door, however, must leave the trier of fact with a false or misleading impression of the facts related. *Crafton v. State*, 821 N.E.2d 907.

Here, Yeary testified that he had not followed or intimidated Sabo, that he did not take part in Worthington's plan to trash Sabo's house, and that he did not take the key to

Sabo's house that Worthington offered him. This testimony gave the jury the false impression that Yeary had not previously harassed Sabo. Yeary's testimony opened the door to the State's introduction of evidence to rebut this false impression. In this instance, Evidence Rule 404(b) did not bar the admission of the State's rebuttal evidence, and therefore, the trial court did not abuse its discretion by allowing the State to rebut Yeary's misleading testimony by admitting evidence of Yeary's prior misconduct.

Additionally, the State's rebuttal evidence was not inadmissible under Evidence Rule 403. That rule provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ind. Evidence Rule 403. The State's rebuttal evidence was probative of Yeary's truthfulness. The probative value of this evidence was very high. The State alleged that Yeary committed criminal acts in January and April of 2006. The only two witnesses to each of these incidents were Jennifer and Yeary. The jury's determination of guilt then came down to which witness it found to be more credible. The State's rebuttal evidence was prejudicial to Yeary, but we cannot say that its probative value was substantially outweighed by the danger of prejudice to Yeary.

B.

Yeary next argues that the State's rebuttal evidence should have been excluded because the State failed to disclose the evidence pursuant to Yeary's pre-trial discovery request. Trial courts typically enjoy broad discretion in ruling on violations of discovery, and we will reverse only if the court abused its discretion. *Beauchamp v. State*, 788 N.E.2d 881 (Ind. Ct. App. 2003). "Exclusion of evidence as a remedy for a discovery

violation is only proper where there is a showing that the State's actions were deliberate or otherwise reprehensible, and this conduct prevented the defendant from receiving a fair trial." *Warren v. State*, 725 N.E.2d 828, 832 (Ind. 2000).

Generally, the proper remedy for a discovery violation is a continuance. *Warren v. State*, 725 N.E.2d 828. The failure to alternatively request a continuance upon moving to exclude evidence, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error. *Id.* Here, Yeary objected to the admission of the State's rebuttal evidence but did not request a continuance. Therefore, this issue is waived.

Waiver notwithstanding, Yeary cannot show that the State's rebuttal evidence should have been excluded. "With respect to rebuttal witnesses, nondisclosure is excused when that witness was unknown and unanticipated." *Beauchamp v. State*, 788 N.E.2d at 892. "A 'known' witness refers to knowledge of the existence of the witness. An 'anticipated' witness is one which a party or her counsel anticipates the need for at trial." *Carrigg v. State*, 696 N.E.2d 392, 398 (Ind. Ct. App. 1998), *trans. denied*.

Here, the State did not know that Yeary was going to testify until he took the stand on the second day of trial. Because the State did not know that Yeary would testify, it did not anticipate the need to introduce any rebuttal evidence. The State's failure to disclose its rebuttal evidence is therefore excused. The trial court did not abuse its discretion by admitting the State's rebuttal evidence.

2.

Yeary argues that the trial court erred in denying his motion for a mistrial. "The trial court is in the best position to assess the impact of a particular event upon the jury."

Anderson v. State, 774 N.E.2d 906, 911 (Ind. Ct. App. 2002). The decision whether to grant or deny a motion for mistrial is committed to the sound discretion of the trial court and will be reversed only upon an abuse of that discretion. *Anderson v. State*, 774 N.E.2d 906. We will reverse the denial of a motion for a mistrial only upon a showing that the defendant was placed in a position of grave peril to which he should not have been subjected. *Id.* The declaration of a mistrial is an extreme action that is only warranted when no other action can be expected to remedy the situation. *Id.* On appeal, the defendant bears the burden of showing that he was placed in grave peril by the denial of the mistrial motion and that no other action could have remedied the perilous situation into which he was placed. *Id.*

Yeary's motion for a mistrial focused on a report, dated September 22, 2006, that was prepared by the police and detailed the various phone calls and text messages Jennifer received on her cell phone over a certain period of time. During the State's case-in-chief, while cross-examining Deputy Lock, defense counsel asked Deputy Lock about the cell phone report. Deputy Lock testified that John Lee of the Dearborn County Sheriff's Department prepared the report and that it detailed incoming and outgoing calls and text messages on Jennifer's cell phone. The report appears to be made up of two parts. The first part lists all incoming, outgoing, and missed calls. The date and time each call was made or received is provided along with the phone number that was dialed or that called. In some cases, the name of the person who called or who was called is provided. The second part of the report lists the text messages that were received. The

date, time, and content of the message is provided along with the phone number of the person who sent the message. Yeary's counsel entered the report into evidence.

While cross-examining Jennifer, Yeary's counsel made use of the cell phone report. Defense counsel asked Jennifer some questions about the first part of the report, focusing mostly on those calls where the name of the caller was provided. In general, Jennifer stated that she did not recognize the names of the individuals identified and denied calling or receiving calls from these individuals. With regard to the second part of the report, Jennifer confirmed that she had received a majority of the text messages listed. Defense counsel cross-examined Jennifer extensively about the text messages she received from Sabo. Defense counsel asserted that Sabo's messages indicated that Jennifer and Sabo were romantically involved, but Jennifer denied this.

After the State rested, Yeary's counsel re-called Deputy Lock to the stand. Defense counsel asked Deputy Lock about the cell phone report that had been introduced into evidence. In answering, Deputy Lock revealed for the first time that there were in fact three different cell phone reports. The first report was the September 22, 2006 report that had been introduced into evidence. Deputy Lock stated that the second report regarding Jennifer's cell phone was generated sometime after September 22, 2006, and was nearly identical to the first report except it contained a few additional text messages. The third report was for Sabo's cell phone. At that point, the jury was removed from the courtroom. Defense counsel stated that he had not received the second or third reports, that the reports were relevant because he was using them to impeach Jennifer's credibility, and because of this, he was moving for a mistrial. The prosecutor stated that

she only had one cell phone report and did not know that other reports existed. The judge ordered Deputy Lock to provide full disclosure of the reports to Yeary's counsel and the State. The judge then took Yeary's motion for a mistrial under advisement and continued the trial until the next morning in order to give the parties additional time to review the new reports.

The next morning, the trial court heard argument on Yeary's motion for a mistrial. After reviewing the new reports, Yeary's counsel did not indicate to the trial court that he had seen any new information in the reports that he would need to cross-examine Jennifer about. The prosecutor stated that the second report was an update of the September 22, 2006 report and contained an additional forty-two text messages, all of which were from Yeary. The prosecutor pointed out that none of the forty-two new text messages were from Sabo, which is what defense counsel would likely want to cross-examine Jennifer about. Deputy Lock stated that the information in the third report on Sabo's phone was also listed in the September 22, 2006 report. After hearing the parties' arguments, the trial court denied Yeary's motion for a mistrial.

Yeary contends that there was no plausible way for him "to extricate himself from the dilemma of having already cross-examined Jennifer before he ever learned that he had been provided the wrong report." *Appellant's Brief* at 23. He concludes that the only remedy in this situation was to grant a mistrial.

Again, we reiterate that Yeary has the burden of showing that the denial of his motion for a mistrial placed him in grave peril. *Anderson v. State*, 774 N.E.2d 906. Yeary has not carried this burden. Yeary's counsel stated that the cell phone reports were

relevant because he was using them to impeach Jennifer's credibility. Defense counsel had an opportunity to thoroughly cross-examine Jennifer on the contents of the September 22, 2006 report. Although Jennifer denied recognizing the phone numbers listed on the first part of the report, she readily admitted that she received the majority of the text messages listed in the second part of the report, including several messages from Sabo. Defense counsel asked Jennifer numerous questions about the text messages she received from Sabo, insinuating that the contents of those messages indicated that she and Sabo were involved in a romantic relationship and that she was lying when she denied this relationship.

Defense counsel's effort to impeach Jennifer was not handicapped by only having the September 22, 2006 report. The second report was an update of the September 22, 2006 report. It contained forty-two additional text messages, all of which were from Yeary. It is not clear how these additional text messages from Yeary would have aided defense counsel's efforts to impeach Jennifer. Additional text messages from Sabo may have benefited Yeary's cause, but the second report did not contain any such messages. Deputy Lock stated that the information in the third report on Sabo's cell phone was also listed in the September 22, 2006 report. Thus, Yeary already possessed the information in the third report. The extra cell phone reports then would not have provided Yeary with any additional ammunition to use in cross-examining Jennifer. The fact that Yeary did not receive these reports does not show that he was placed in grave peril. Therefore, the trial court properly denied his motion for a mistrial.

3.

Yeary next argues that the State did not present sufficient evidence to support his convictions for criminal confinement, intimidation, and illegal possession of a handgun. In reviewing a sufficiency of the evidence claim, we do not reweigh the evidence or judge the credibility of the witnesses. *Cline v. State*, 860 N.E.2d 647 (Ind. Ct. App. 2007). We will only consider the evidence most favorable to the judgment and reasonable inferences drawn therefrom. *Id.* We will affirm the conviction if there is probative evidence from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

A.

Yeary's criminal confinement and intimidation arguments are intertwined. To support his position that there was insufficient evidence to convict him of criminal confinement, Yeary points us to *Cunningham v. State*, 870 N.E.2d 552 (Ind. Ct. App. 2007), where we noted, "Our courts of appeal have held that in order to prove confinement beyond the main crime charged, there must be something more than the act necessary to effectuate the crime, albeit, rape, theft, escape or battery." *Id.* at 553. Relying on this, Yeary contends that the State had to prove something more than just intimidation in order to convict him of criminal confinement, which he asserts the State failed to do. Given this argument, it may be helpful to first consider whether sufficient evidence was introduced to prove Yeary committed intimidation. Then we can move on to consider whether Yeary's criminal confinement convictions were supported by something more than the mere act of intimidation.

We begin by considering Yeary's convictions for intimidation and criminal confinement for the incident in January 2006. In order to prove that Yeary committed intimidation as a class C felony, the State was required to prove that Yeary communicated a threat to another person with the intent that the other person be placed in fear of retaliation for a prior lawful act while drawing or using a deadly weapon. I.C. § 35-45-2-1. The "threat" can be an expression, by either words or actions, of an intention to unlawfully injure the person threatened. I.C. § 35-45-2-1(c). Proof that the victim is engaged in an act that is not illegal at the time the threat is made is not sufficient. *Casey v. State*, 676 N.E.2d 1069 (Ind. Ct. App. 1997). "Rather, the State must establish that the legal act occurred prior to the threat and that the defendant intended to place the victim in fear of retaliation for that act." *Id.* at 1072.

Here, the jury could find that Jennifer engaged in a lawful act when she spoke with Monjar at the employee party at Belterra Casino. This angered Yeary who left the party, slamming the door behind him. Jennifer followed Yeary outside. In the parking lot, she saw Yeary walking back towards the building. Yeary came up to Jennifer, showed her that he had a gun, and said, "[I]t's a good thing that you came out when you did because I was going to come in and shoot him [Monjar]." *Transcript* at 81. The couple then went to a bar in Vevay where Yeary told Jennifer he was angry with her because she embarrassed him in front of his co-workers and that he wanted to kill her. As they were driving home, Yeary made Jennifer stop at the Patriot boat ramp. He forced Jennifer to walk down to the river where he told her that he was ashamed of her. Yeary started spitting on Jennifer and said that he wanted to kill her. The jury could reasonably infer

that the threats Yearly made to Jennifer were in retaliation for her speaking with Monjar. Yearly took Jennifer back to their vehicle where he continued to spit on her. He then drew his gun and fired several shots into the air. The discharged shell casings hit Jennifer who was sitting in the passenger seat. Because Yearly drew his gun shortly after threatening to kill Jennifer, the jury could properly conclude that the threat and the drawing of the gun were part of one continuous transaction. *See Hall v. State*, 837 N.E.2d 159 (Ind. Ct. App. 2005) (concluding that because defendant drew a knife immediately after he threatened to kill the victim, the threat and the wielding of the knife were part of one continuous transaction, and therefore, sufficient evidence was introduced to prove defendant drew a knife while committing intimidation), *trans. denied*. Therefore, sufficient evidence was introduced to support Yearly's conviction for intimidation as a class C felony for the incident in January of 2006.

In order to prove that Yearly committed class B felony criminal confinement in January 2006, the State was required to prove that Yearly knowingly or intentionally confined another person without that other person's consent while armed with a deadly weapon. I.C. § 35-42-3-3. We have previously stated that "[c]onfinement exists when there is a substantial interference with liberty without consent." *Hopkins v. State*, 747 N.E.2d 598, 606 (Ind. Ct. App. 2001), *trans. denied*. "Any amount of force can cause confinement because force, however brief, equals confinement." *Id.*

Yearly's actions in January 2006 went beyond the mere act of intimidation. After seeing Jennifer speaking with Monjar, Yearly became angry and left the party at the Belterra Casino. Jennifer followed after Yearly and met him outside in the parking lot

where he showed her that he was armed with a gun. Yearly and Jennifer then went to a bar in Vevay. At the bar, Yearly told Jennifer that he was angry with her for making him look bad in front of his co-workers and that he wanted to kill her. As they were driving home, Yearly forced Jennifer to stop at the Patriot boat ramp. He made Jennifer walk down to the river where he began to berate her. He told Jennifer that he was ashamed of her, that he wanted to kill her, and then started spitting on her. Yearly kept Jennifer down by the river for nearly half an hour. During this period, Jennifer stated that she did not feel free to leave and that she felt her life was in danger. Based on this, the jury could reasonably infer that Jennifer did not consent to remaining at the boat ramp for nearly half an hour. When Jennifer and Yearly returned to their car, Yearly drew his gun and fired several shots into the air. This indicated that Yearly was armed while he kept Jennifer confined at the boat ramp. This evidence was sufficient to permit the jury to find that Yearly committed class B felony criminal confinement in January 2006.

We next turn to Yearly's intimidation conviction for the events that occurred on April 6, 2006. On that day, Yearly and Jennifer were doing some renovation work on their Markland Pike home. As the hour grew late, Jennifer decided to return to the couple's home in Cincinnati because their son T.Y. had school the next day. Jennifer asked Yearly if he wanted to go home with her, and Yearly told her no. Jennifer then got in the car with T.Y. and K.Y. and began to drive home. The jury could properly find that Jennifer engaged in a lawful act when she decided to leave Yearly at the Markland Pike property and return home. As Jennifer was driving away, she saw Yearly come out onto the front porch and point a gun at the car. By pointing a gun at the car, the jury could

reasonably conclude that Yearly communicated a threat to Jennifer that he intended to injure her in retaliation for her leaving the Markland Pike property and going home. The evidence was sufficient to support Yearly's conviction for intimidation as a class C felony for the incident on April 6, 2006.

Turning to the criminal confinement conviction for the April 6, 2006 incident, the evidence reveals that after Yearly came out onto the porch of the Markland Pike property, Jennifer backed the truck up into the driveway to see if Yearly had changed his mind about going home. Yearly came up to the car, opened the passenger side door, reached into the center console, and took out a gun that was stored there. Yearly then knelt down, rested his elbows on the passenger seat, and pointed the gun at Jennifer's head. Yearly held the gun pointed at Jennifer's head for what Jennifer felt was a long time. Jennifer testified that while Yearly was pointing the gun at her head, she did not feel free to leave and was fearful for her life. Based on this, the jury could reasonably conclude that Jennifer did not consent to remaining in the car, but was confined against her will because Yearly pointed a gun at her head for what to her seemed like a long period of time. Yearly eventually lowered the gun and walked away. The evidence presented by the State was sufficient to permit the jury to find that Yearly committed criminal confinement as a class B felony on April 6, 2006.

B.

Yearly also argues that the State did not present sufficient evidence to support his conviction for Count 8 Illegal Possession of a Handgun as a class A misdemeanor. This conviction arises out of the incident that occurred on April 6, 2006 at the Markland Pike

home. I.C. § 35-47-2-1 states, “[A] person shall not carry a handgun in any vehicle or on or about the person’s body, except in the person’s dwelling, on the person’s property or fixed place of business, without a license issued under this chapter being in the person’s possession.” I.C. § 35-47-2-24(a) provides that a defendant bears the burden of proving that he was in possession of the necessary handgun license.

Yeary seems to concede that he possessed a handgun on April 6, 2006 while at the Markland Pike property. Yeary, however, contends that the Markland Pike property was his property, and thus, he did not need to have a license for the handgun. To support his position that the Markland Pike property belonged to him, he points out that the property was an asset acquired during the marriage and cites Ind. Code Ann. § 31-15-7-4 (West, PREMISE through 2007 1st Regular Sess.). That statute provides as follows:

- (a) In an action for dissolution of marriage under IC 31-15-2-2, the court shall divide the property of the parties whether:
 - (1) owned by either spouse before the marriage;
 - (2) acquired by either spouse in his or her own right:
 - (A) after the marriage; and
 - (B) before final separation of the parties; or
 - (3) acquired by their joint efforts.

I.C. § 31-15-7-4. In discussing this statute, we have previously explained:

It is well-established in Indiana that all marital property goes into the marital pot for division, whether it was owned by either spouse prior to the marriage, acquired by either spouse after the marriage and prior to final separation of the parties, or acquired by their joint efforts. This “one-pot” theory insures that all assets are subject to the trial court’s power to divide and award. While the trial court may ultimately determine that a particular asset should be awarded solely to one spouse, it must first include the asset in its consideration of the marital estate to be divided.

Hill v. Hill, 863 N.E.2d 456, 460 (Ind. Ct. App. 2007) (citations omitted).

Pursuant to the terms of I.C. § 31-15-7-4, should Jennifer and Yearly divorce,⁷ because the Markland Pike property was acquired after the marriage but before a final separation, it would be included in the marital pot. Nevertheless, the mere fact that this property would be placed in the marital pot, does not necessarily mean it was owned by both Jennifer and Yearly. In Indiana, there is no presumption that property purchased while a couple is married is jointly owned by the husband and wife. I.C. § 31-15-7-4 specifically contemplates that during a marriage a husband or a wife will purchase property in his or her own right.

The facts most favorable to the verdict indicate that Jennifer purchased the Markland Pike property in her own right. The property was purchased in March 2006. Jennifer testified that she and Yearly intended to buy the property together, but Yearly was not financially able to obtain a mortgage. Jennifer was informed by her bank that she could purchase the property on her own, but not with Yearly. Jennifer decided to go ahead and buy the property, and the mortgage and the deed to the Markland Pike property are listed solely in her name. Based on this evidence, the jury could reasonably conclude that the Markland Pike property did not belong to Yearly. Because Yearly failed to produce a license for his handgun, sufficient evidence was introduced to support Yearly's conviction for illegal possession of a handgun as a class A misdemeanor.

⁷ Testimony at Yearly's trial indicates that Jennifer and Yearly were in the process of obtaining a divorce but there is no indication in the record as to when or if that divorce was finalized.

4.

Yeary next contends that his sentence was inappropriate in light of his character and the nature of his offense. We have the authority to revise a sentence if, after due consideration of the trial court's decision, we determine that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B).

In sentencing Yeary, the trial court found two mitigating circumstances which were Yeary's lack of a criminal history and that his imprisonment would cause a hardship to his children. The trial court found the fact that Yeary committed the April 6, 2006 offenses in front of his children was an aggravating factor. The trial court concluded that the mitigating factors did not warrant a reduced sentence for Yeary. The trial court merged Counts 3, 5, and 7 into Count 1 and entered a ten-year sentence for that count. Similarly, the trial court merged Counts 4, 6, 8, and 10 into Count 2 and entered a ten-year sentence on that count. The trial court specified that the sentences should be served consecutively for a total sentence of twenty years.

As to Yeary's character, we note that he has no criminal history. The nature of Yeary's offenses, however, are serious and do not reflect well upon his character. In January of 2006, Yeary threatened to kill his wife multiple times throughout the course of one evening simply because she spoke with a man she knew from school. After indicating that he wanted to kill her, Yeary, who was armed with a handgun, took Jennifer to a secluded boat ramp. Yeary confined Jennifer to the boat ramp for nearly thirty minutes while he berated her, told her that he wanted to kill her, and spat on her.

On April 6, 2006, Yearly pointed a gun at Jennifer's head while his children watched from the backseat of the car. Given the serious nature of Yearly's offenses, we cannot say that his sentence was inappropriate.

Judgment affirmed.

MATHIAS, J., and ROBB, J., concur.